

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. S-2629**

**PETITION OF ALAN AND SUSAN DECHTER LLC**

OPINION OF THE BOARD

(Opinion Adopted November 2, 2005)

(Effective Date of Opinion: February 10, 2006)

Case No. S-2629 is for a special exception to permit a non-resident medical practitioner's office pursuant to Section 59-G-2.36 of the Montgomery County Zoning Ordinance, Chapter 59, Montgomery County Code 1994, as amended (the "Zoning Ordinance").

The subject property consists of parcels P911 and P912 in St. Winexburg Subdivision, located at 12817 Georgia Avenue, Silver Spring, Maryland, 20906, in the R-90 Zone (the "Property").

Decision of the Board:                      Special Exception **Denied**.

The Hearing Examiner for Montgomery County held a hearing on the application (the "Petition") on June 15, 2005, re-opened the record on August 19, 2005, and again on October 10, 2005, closed the record on October 20, 2005, and on October 21, 2005, issued a Report and Recommendation for approval of the special exception with certain conditions. The Board of Appeals (the "Board") considered the Hearing Examiner's Report and Recommendation at its Worksession on November 2, 2005. The Board has carefully considered the Hearing Examiner's Report and Recommendation and has reviewed the record in the case. The Board reiterates here those findings of fact it considered particularly relevant to its determination in this case. Where the Board's conclusions of law concur with those of the Hearing Examiner, we so note and refer to the OZAH Report.

Alan Dechter appeared on behalf of Alan and Susan Dechter LLC<sup>1</sup> ("Petitioner") and called as witnesses Perry Berman, land planner; Esther Gelman, community organizer; Bill Landfair, land planner; Daniel Nalls, dental equipment manufacturer's representative, and Allan Neyman, architect, in support of the Petition.

Martin Klauber, Esq., the People's Counsel of Montgomery County, Maryland, participated in the public hearing and presented legal argument on the issue of whether the requested special exception must be established in a pre-existing building as a matter of law.

## **EVIDENCE PRESENTED TO THE BOARD**

1. The Board adopts the facts as set forth in the OZAH Report, including the Technical Staff Report, Exhibit 27.

2. **Subject Property and Neighborhood.** The subject property is located at the corner of Weller Road and Georgia Avenue, north of the Glenmont metro station. The area abutting the subject property to the east is developed with single-family homes in the R-90 zone with an average lot size of 10,000 to 15,000 square feet (Tr. at 91, testimony of Landfair). Bordering the subject property to the south is a 46-unit townhouse community in the RT-12.5 zone. South of the townhouses along Georgia Avenue, existing development includes the First Assembly of God Church, a large multi-family apartment complex, the

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<sup>1</sup> Under Maryland law, an individual must be admitted to the Maryland Bar and meet requirements of the Maryland Court of Appeals before he or she may practice law in the State. Maryland Code, Business Occupations and Professions Article, Section 10-206. The unauthorized practice of law is similarly prohibited by Section 10-601 of that Article. Indeed, while under the Maryland Rules an individual is permitted to represent himself in a legal proceeding, Maryland Rule 2-131 makes clear (with certain stated exceptions) that a person other than an individual must enter an appearance in court by an attorney. Maryland courts have held that the representation of another person before an administrative body is the "practice of law." *See, e.g.,* Lukas v. Bar Association of Montgomery County, Maryland, Inc., 35 Md. 442, 444-45, 371 A.2d 669, 671 (1977), in which the Court stated that "[i]n considering the scope of the practice of law mere nomenclature is unimportant, as, for example, whether or not the tribunal is called a 'court,' or the controversy 'litigation.' Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission." *See also* Public Services Commission v. Hahn Transportation Co., 253 Md. 571, 253 A.2d 845 (1969) ("A lay officer or employee of a corporation or a lay partner or employee of a co-partnership who represented his firm before the Commission in a contested case would be unlawfully practicing law although no part of his remuneration was allocated to his services as such representative."). Thus, just as representation of a limited liability company in courtroom hearing would require counsel, so would representation of a limited liability company in a hearing before an administrative body. In the instant case, Dr. Dechter represented the Petitioner LLC before the Hearing Examiner. Because Dr. Dechter and his wife are the sole members of the Petitioner LLC, because there was no opposition in this hearing, and because the failure to retain counsel was not noted until after the Board had rendered its oral decision in this matter, the Board accepts in this case that a sufficient identity of interest exists between Dr. Dechter and the Petitioner to allow Dr. Dechter to prosecute this petition on his own behalf as the operator of the practice for which Petitioner seeks the special exception.

Glenmont Metro station, and a shopping center. The properties confronting the subject property across Georgia Avenue are developed with single-family homes in the R-60 zone. (OZAH Report at 5-9.)

3. The Board adopts the relevant neighborhood defined in the OZAH Report as the predominantly residential “immediate” neighborhood, with the R-90 and R-12.5 zones abutting the Property, and the more heterogeneously developed general neighborhood bounded roughly by Hathaway Drive on the north, Georgia Avenue on the west, the Glenmont Metro Station to the south and Layhill Road to the east. The general neighborhood is characterized by single-family residential uses interspersed with multi-family development and institutional uses (primarily churches) along Georgia Avenue north of the Glenmont metro station (OZAH Report at 8.)

4. **Master Plan.** The Master Plan applicable to the Property is the *Glenmont Transit Impact Area and Vicinity Sector Plan, Approved and Adopted September 1997* (the “Sector Plan”). The Sector Plan’s objectives for the neighborhoods surrounding the Glenmont Center include maintaining the character and stability of the existing residential neighborhoods, and establishing Georgia Avenue as a pedestrian-friendly green boulevard. The Sector Plan specifically identified the Property as “suitable for R-90 cluster zoning to facilitate relocation of the existing curb cut from Georgia Avenue to Weller Road” (Exhibit 7 at 69). The Sector Plan emphasizes the importance of expanding the range of housing choices in the area surrounding the Property, stating that “[w]hile accommodating appropriate redevelopment in close proximity to metro, this Plan seeks to preserve and enhance the existing viable neighborhoods that surround the center and offer a variety of housing choices. The plan reinforces the existing diverse community by creating new housing opportunities for all income groups, an element of successful mixed-use areas that is underrepresented today in Glenmont” (Exhibit 27 at 5). The Sector Plan’s land use map recommends the area including the subject property for single-family residential use, detached or attached (Exhibit 7 at 19), and includes the Property, along with three other properties studied, as ones important to “maintain[ing] the character and stability of the existing residential neighborhoods surrounding Glenmont Center” (Exhibit 7 at 69).

5. **Proposed Development.** Petitioner proposes to construct a new building, with two stories plus basement, to house the proposed dental office and a separate residential dwelling unit. The Property consists of two parcels totaling 38,387 square feet in area. The proposed building would have a total area of 6,317 square feet, with 2,690 square feet (43 percent) dedicated to the dental practice and the remaining 3,627 square feet (57 percent) dedicated to the residential use. Petitioner also proposes to construct a free-standing garage on the Property and to develop a surface parking facility for 11 cars. (OZAH Report, at 14, Exhibit 60(b).) The Property would be enclosed by a 6-foot tall wooden fence along most of the south and east property lines. (OZAH Report at 50, Exhibit 60(a).)

6. Residential lot sizes in the neighborhood range from approximately 10,000 to 15,000 square feet, and homes range from approximately 2,000 to 3,000 square feet in size, either as one and one-half story detached structures or two-story townhouses. Existing houses in the neighborhood typically have brick exteriors. (Tr. at 90-91, testimony of Landfair.)

7. The following table summarizes the applicable development standards in comparison to the proposal (adapted from Exhibit 60(a), with references to the Zoning Ordinance provided):

Development Standard	Required/Allowed	Proposed
<b>Lot Area and Width – R90 Zone (Sec. 59-C-1.322(a), (b))</b>  Minimum net lot area for a main building together with its accessory buildings  Minimum lot width	  9,000 square feet  75 feet	  38,387 square feet  224 feet
<b>Maximum Lot Coverage – R90 Zone (Sec. 59-C-1.328):</b>  Maximum percentage of net lot area that may be covered by buildings including accessory buildings:	  30	  16
<b>Yard requirements for a main building – R90 Zone (Sec. 59-C-1.323):</b>  A main building must not be nearer to any street line than the distance shown:  A main building must not be nearer to any lot line	  30 feet	  30 feet

Development Standard	Required/Allowed	Proposed
<p>than the following:</p> <p>One side: Sum of both sides: Rear:</p>	<p>8 feet 25 feet 30 feet</p>	<p>71 feet 74 feet</p>
<p><b>Yard requirements for an accessory building – R90 Zone (Sec. 59-C-1.326):</b></p> <p>An accessory building or structure must be set back from the lot lines within a minimum setback as follows:</p> <p>From the street line: From a side lot line: From a rear lot line:</p>	<p>60 feet 5 feet 5 feet</p>	<p>88 feet 9 feet 13 feet</p>
<p><b>Maximum building height – R90 Zone (Sec. 59-C-1.327):</b></p>	<p>35 feet</p>	<p>20'-3" (Office) 16'-1" (Intermezzo) 29'-2" (Residence)</p>
<p><b>Parking – (Sec. 59-E-3.7):</b></p> <p>Residence: Dental Office: Total:</p>	<p>2 spaces* <u>8 spaces**</u> 10 spaces</p> <p>*2 spaces/dwelling unit required **minimum of 4 spaces/practitioner required</p>	<p>2 spaces <u>12 spaces</u> 14 spaces***</p> <p>***11 surface parking spaces plus 3 garage spaces</p>

**8. Proposed Buildings.** For the main building on the Property, Petitioner proposes a board-and-batten wood-sided structure with double-hung windows, a steeply pitched peaked roof and a garage incorporated into the structure (Exhibit

51(g)). The architectural expression of this building is variously described in the record as resembling a Maryland farmhouse (intended to recall the building that formerly occupied the site) (Tr. at 90, testimony of Dechter, and Tr. at 176, testimony of Gelman) or being of the “same architectural design” as the First Assembly of God Church and Glenmont United Methodist Church nearby (Exhibit 24(i)). The west (Georgia Avenue) and east elevations of the main building reflect a three-part architectural composition, with the residence and dental office housed in two separate pavilions linked by a one-story “intermezzo” containing part of the residence and a one-car garage which serves the dental practice. There are covered porches on the west, east and south sides of the building. The residential wing is two stories tall, with an attic. The exterior expression of the office wing is that of a two-story structure, although it only contains one floor of habitable space for the dental practice.

The design incorporates elements that suggest both residential structures and barns, with a mixture of monumental and rustic design details. The building extends some 100 feet along the Georgia Avenue frontage and is 52 feet wide, with a porch extending an additional six feet to the east at the north end of the building. The first floor footprint, including the porches, is approximately 5,200 square feet. (Exhibits 24(c), 24(d), 51(g) and OZAH Report at 19-21.)

Petitioner also proposes to construct a free-standing two-car garage at the southeast corner of the Property, set back nine feet from the southern property line and 13 feet from the eastern property line. The garage would be screened from the adjacent residential properties by a six-foot tall wood screening fence. (Exhibit 60(a).)

**9. Parking Facility.** Petitioner proposes to accommodate vehicles on the Property in the free-standing garage (2 cars), the garage incorporated into the main building (1 car), and on a surface parking lot (11 cars) along the east side of the Property. All vehicular access to the Property would occur through a two-lane driveway off of Weller Road at the northeast corner of the Property. (See OZAH Report at 21, Exhibits 24(c) and 60(a).)

**10. Proposed Operations:** The hours of the proposed dental clinic would be as follows:

Monday – Friday	7:45 am to 6:00 pm (Tuesday evenings until 7:00 pm)
Saturday	8:00 am to 1:00 pm

Petitioner proposes to limit the number of patients to no more than 80 per full working day.

(OZAH Report at 22.)

11. Petitioner proposes to limit the practice to two dentists, including Dr. Dechter. Additional staff would consist of five part-time dental assistants and four part-time office staff. The record contains varying information about the proposed working hours of nonprofessional staff members. The Hearing Examiner recommended the following limitations on the operating staff population and scheduling of patient visits in order to prevent overburdening the parking area: (a) no more than seven non-professional staff on site during the morning office hours (opening till 1:00 pm); (b) no more than six non-professional staff on site during the afternoon office hours (1:00 pm to closing); no more than five patient appointment during any hour of the morning peak period, and (d) no more than six patient appointments during any hour of the evening peak period. (OZAH Report at 26 and 65.)

12. The dental office would consist of seven operatories, a waiting and reception area, two private offices and support spaces (Exhibit 24(c)). Technical Staff observed that the “typical dental practice in a residential neighborhood generally consists of not more than 4 chairs” (Exhibit 27 at 15).

**13. Landscaping, Lighting and Signage.** Petitioner proposes to provide a 6’ tall wood screening fence along the south and east property lines of the Property and to install landscaping over much of the site, including 16 ornamental trees, seven evergreen trees, shrubs and annuals (OZAH Report at 22, Exhibit 60(b)). Proposed exterior lighting would consist of two 14-foot pole lights in the parking lot, one wall-mounted light on the free-standing garage and 12 down-lights in the ceilings of the porches. The pole lights would be turned off 30 minutes after the end of operating hours each day, and the light on the free-standing garage would be manually operated. Based on the photometric plan, Mr. Landfair, one of Petitioner’s land planners, testified that the overall spread of light would be contained in the center of the property, lighting would not spill over onto adjacent properties, and the sources of light would not affect adjacent properties. (Tr. at 59-60, OZAH Report at 24, Exhibit 41.) Petitioner proposes to install a sign as shown in Exhibit 51(f), which would be subject to any required approvals from the Sign Review Board.

**14. Transportation.** Transportation Planning Technical Staff concluded, based on trip generation figures provided by Petitioner, that the proposed use would have no adverse effect on nearby roadway conditions or pedestrian facilities because it would generate fewer than 30 peak hour trips and would therefore not require a traffic study. Under the Local Area Transportation Review Guidelines, a proposed development which is expected to generate 30 or more peak hour trips has a measurable traffic impact sufficient to require a traffic study, but impacts below this level are generally regarded as *de minimis*. (Exhibit 29 at 8-10.) Transportation Planning Technical Staff proposed conditions limiting the number of appointments during the morning and afternoon peak periods in order to maintain the low impact of traffic generated by the proposed use. (Exhibit 29 at 9.)

Vehicular access to the site would be provided by a two-lane driveway on Weller Road, located as far as possible from the intersection of Weller Road with Georgia Avenue (OZAH Report at 25).

**15. Environment.** Environmental Planning Staff concluded that, based on the size of the Property, Petitioner is exempt from submitting a Forest Conservation Plan, but would still be required to submit a Tree Save Plan. The property is not located within a Special Protection Area or Primary Management Area. There are no streams, steep slopes, wetlands, erodible soils or other environmental encumbrances on the site. (Exhibit 27 at 10-11.)

## **FINDINGS OF THE BOARD**

The Board finds that the requested modification does not comply with the specific standards set forth in Sections 59-G-1.2 and 59-G-2.36 of the Zoning Ordinance and discussed as follows:

### **Section 59-G-1.2. Conditions for granting a special exception.**

**59-G-1.21. Standard for evaluation.** *A special exception must not be granted without the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner, or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with inherent adverse effects, are a sufficient basis to deny a special exception.*

The Board finds that the proposed use, if established at the proposed location, would exhibit non-inherent characteristics that would result in non-inherent adverse effects on the surrounding neighborhood sufficient to warrant the denial of the subject application, as discussed below.



The inherent, generic physical and operational characteristics of the use must be established considering size, scale, scope, light, noise, traffic and environment. The primary physical characteristics of a non-resident medical practitioner's office in a residential structure consist of a single-family structure to house the underlying residential use and the medical practitioner special exception, a parking facility adequate to accommodate residents, employees and visitors, exterior lighting, an identification sign, and trips to and from the site by clients, employees and delivery services. Technical Staff identified, and the Board adopts, the following non-inherent effects in the instant case: hours of operation, number of parking spaces, traffic on and around the site, and the location and size of the driveway (OZAH Report at 48-50). The Board also concurs with the Hearing Examiner that the proposed free-standing garage constitutes a non-inherent characteristic not typical for a medical practitioner's office (OZAH Report at 51). The Board additionally identifies the proposed scale, scope and intensity of operations, involving up to 80 patient visits a day, to be a non-inherent adverse effect of the proposed use.

**Hours of operation.** The Board concurs with Technical Staff and the Hearing Examiner that the proposed hours of operation represent a non-inherent adverse effect of the proposed use. Medical offices do not necessarily involve weekend or evening operating hours. The record includes no evidence as to whether the early evening and Saturday hours proposed in this case are typical of the use. Evening hours would be limited to one evening a week on Tuesdays and Saturday hours would be limited to the morning. Considered alone, the Board finds that the hours of operation would not constitute a non-inherent adverse effect serious enough to merit denial of the Petition. However, when coupled with the intensity and character of activity anticipated at the Property as discussed in relation to subsection 59-G-1.21(a)(4) below, the extended operating hours would tend to amplify the non-inherent adverse effects of the high volume of patient visits.

**Parking and traffic on and around the site:** The Board finds that the facilities proposed to accommodate enough parking on the Property to serve the anticipated numbers of patients and staff associated with the dental practice would represent a non-inherent adverse effect of the proposed use. The Board finds that the proposed two-lane driveway and surface parking lot for eleven cars, even if located to the side of the Property rather than at the front, as the Hearing Examiner points out (OZAH Report at 21) diminishes but does not eliminate the parking lot's overtly commercial scale and appearance.

The Board adopts Transportation Planning Technical Staff's conclusion that the proposed use would produce a negligible impact on the area roadways. The Board finds, however, that the impact of traffic that 80 patients, plus a change of staff at midday, would generate on the Property over the course of the day would have a non-inherent adverse effect on the Property's immediate neighbors. The Board concurs with the Hearing Examiner's finding that the

location of the driveway sixteen feet from a property line shared with a single-family home is a non-inherent characteristic of the proposed use. The Board recognizes that the driveway is necessarily located as far from the Weller Road/Georgia Avenue intersection as possible to enhance safety on the public roadway, but notes that this location brings all traffic to the Property in a location that has a maximum impact on the adjacent single-family residence. The proposed solid wood fence and existing vegetation along the common property line provide some screening of the driveway and parking lot, but the Board finds that such screening ultimately will not mitigate the underlying non-inherent adverse effects of the noise and activity that would be generated by the anticipated volume of traffic along this property line.

**Free-standing garage:** The Board finds that the free-standing garage is not a typical component of a medical practitioner's office and therefore constitutes a non-inherent characteristic of the instant application. The garage is proposed to be used by the residential tenants. The garage is proposed to be located in the southeast corner of the property, the only location on the site which abuts single-family residential uses along both property lines. The garage would sit nine feet from the southern property line and 13 feet from the eastern property line. The Board finds that the garage, located in the corner of the site closest to the abutting residential uses, even if screened as proposed by a fence, would, in conjunction with the high-volume use of the driveway and parking facility for the dental practice, produce a non-inherent adverse effect on the adjacent residential properties.

**Intensity, scale and scope of proposed use.** The Board finds that the anticipated intensity of the use, with 7 patient chairs, 5.5 full-time equivalent staff members, and up to 80 patient visits per day, is not characteristic of a medical practitioner's office located within a single family dwelling and would exhibit approximately double the intensity of a typical dental practice in a residential neighborhood, which Technical Staff identified as operating an average of four patient chairs (Exhibit 29 at 15). In order to accommodate this level of activity, the facilities must be larger in size and scale than the surrounding residences, with the result that the proposed building splits the residential and office portions of the program into two separate and readily identifiable volumes, each of which is the size of a substantial house. The scope of the proposed use thus demands a building larger than a typical single-family house in the surrounding area, and a site larger than the neighboring residential lots, and the Board therefore finds the extent of such increases in scale to constitute a non-inherent adverse effect sufficient to warrant the denial of the application.

The Board finds that the conditions proposed by the Technical Staff and Hearing Examiner might mitigate some of the effects discussed above, but cannot overcome the fundamental incompatibility of the proposed project's scale and intensity of use with its neighbors.

**Section 59-G-1.21. General conditions.**

- (a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be finds from a preponderance of the evidence of record that the proposed use:*
  - (1) *Is a permissible special exception in the zone*

The Board finds that the requested special exception is permissible in the R-90 Zone.

- (2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

The Board finds that the requested special exception meets some, but not all, of the applicable specific standards and requirements in Section 59-G-2.36, and that the use as proposed is not presumptively compatible with either (a) existing neighboring residential development or (b) with the specific recommendations for the Property contained in the Sector Plan, as discussed at subparagraph (3) below.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny a special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Board finds that the proposed use is not consistent with the Sector Plan. *Glenmont Transit Impact Area and Vicinity Sector Plan, Approved and Adopted September 1997* (the "Sector Plan"). The Sector Plan's objectives for the neighborhoods surrounding the Glenmont Center include maintaining the

character and stability of the existing residential neighborhoods, and establishing Georgia Avenue as a pedestrian-friendly green boulevard. The Sector Plan specifically identified the subject property as “suitable for R-90 cluster zoning to facilitate relocation of the existing curb cut from Georgia Avenue to Weller Road” (Exhibit 7 at 69). The Sector Plan emphasizes the importance of expanding the range of housing choices in the area surrounding the Property, stating that “[w]hile accommodating appropriate redevelopment in close proximity to metro, this Plan seeks to preserve and enhance the existing viable neighborhoods that surround the center and offer a variety of housing choices. The plan reinforces the existing diverse community *by creating new housing opportunities for all income groups, an element of successful mixed-use areas that is underrepresented today in Glenmont*” (Exhibit 27 at 5, italics added). The Sector Plan’s land use map recommends the area including the subject property for single-family residential use, detached or attached (Exhibit 7 at 19), and includes the Property, along with three other properties studied, as ones important to “maintain[ing] the character and stability of the existing residential neighborhoods surrounding Glenmont Center” (Exhibit 7 at 69).

Accordingly, the Board finds that given the Sector Plan’s clear emphasis on increasing housing opportunities in the area of the Property and the specific recommendation that the Property be developed under R-90 cluster zoning in furtherance of this goal, the proposed use does not conform to the Sector Plan.

The Board finds that the proposed development is more readily comparable with the scale and density of existing institutional uses in the area than with the residential areas, zoned R-90 and R-12.5, which surround the Property. Technical Staff succinctly opines, and the Board concurs, that “[t]he proposed office, with its scale and scope, is more appropriate in a commercially zoned area than in a residential zone where it is competing for land that could be more appropriately allocated for residential uses” (Exhibit 27 at 15).

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale, and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The Board finds that the use will not be in harmony with the general character of the neighborhood considering the factors identified in Subsection 59-G-1.21(a)(4).

**Population density:** Somewhat paradoxically, although the proposed development would produce a residential population density less intense than that of the existing surrounding single-family zones, the proposed medical office is projected to attract 80 patients a day, a volume of activity and traffic not typical for any single property in a single-family residential zone. Although the site is

large enough to comfortably accommodate the proposed main structure, free-standing garage and surface parking areas, the combined effect of the unusually large site, 6,000 square foot main structure and parking area for 14 cars would result in development dramatically larger in scale and intensity of use than is in keeping with the R-90 residential zone it is proposed to inhabit. The Board therefore finds that the proposed population density of the site is not in harmony with that of the neighborhood.

**Design, scale and bulk.** For the main building on the Property, Petitioner proposes a board-and-batten wood-sided structure with double-hung windows, a steeply pitched peaked roof and a garage incorporated into the structure (Exhibit 51(g)). The architectural expression of this building is variously described in the record as resembling a Maryland farmhouse (intended to recall the building that formerly occupied the site) (Tr. at 90, testimony of Dechter, and Tr. at 176, testimony of Gelman) or being of the “same architectural design” as the First Assembly of God Church and Glenmont United Methodist Church nearby (Exhibit 24(i)). Although there is much discussion in the record suggesting that the proposed building would stand out inharmoniously from its largely brick-clad neighbors in large part because of its exterior architectural expression, the Board finds that the building’s wood exterior, on its own, would not cause the building to appear ill-suited to its surroundings. Much more problematic are the size and scale of the building and the size and nature of development of the Property.

The subject application proposes a 100 foot long structure two to three times larger than the average home in the neighborhood. The Property is a plot of 38,387 square feet, as much as three times as large as the average 10,000 to 15,000 square foot lot size in the neighborhood. The residential component of the project alone, at 3,627 square feet, is larger than the largest homes in the area (of approximately 3,000 square feet) identified by Mr. Landfair, Petitioner’s planning expert. It is apparent that the size of the proposed residential dwelling unit is a function of the size of the dental office, since the special exception is prohibited from occupying more than 50 percent of the total building area. In combination, the two uses produce a structure that is not compatibly scaled to the existing single-family residential structures in the neighborhood. Petitioner’s other planning expert, Mr. Berman, even testified that the size of the proposed building should be compared to the existing churches and townhouses in the general neighborhood of the Property (OZAH Report at 42). Accordingly, the Board finds that the scale and bulk of the proposed development are more commercial or institutional than residential in nature and therefore not in harmony with the existing surrounding residential development.

**Intensity and character of activity.** Although most of the activities associated with the proposed use would be housed indoors, the impact of 80 patients, two doctors and nine staff members coming and going to and from the Property cannot reasonably be compared to the level of activity typical of a dental practice housed in a single-family structure in a residential zone. Petitioner

proposes to operate seven patient chairs, whereas the uncontested evidence reflects that the typical dental practice in a residential neighborhood generally consists of not more than four chairs.

The Hearing Examiner points out that the Property sits among a string of non-single-family uses on the east side of Georgia Avenue, including townhouses, garden apartments, two large churches, a Metro station and a shopping center. The Board recognizes the heterogeneity of uses along Georgia Avenue in the general vicinity of the Property. However, residential uses in residential zones about the Property on both the south and east sides, and the Sector Plan specifically identifies the creation of housing in the Glenmont area generally, and higher-density residential uses on the Property in particular, as policy goals. The Board finds that the residential nature of the immediately surrounding neighborhood and the specific recommendations of the Sector Plan outweigh the significance of the presence of some non-residential uses in the general vicinity of the Property along Georgia Avenue. The Board therefore concludes the subject proposal does not conform to the requirements of 59-G-1.21(a)(4).

**Traffic, parking conditions and number of similar uses.** The Board finds that the parking facility required to support an operation of the size Petitioner proposes cannot be reconciled with the type of parking accommodation typically found on a single-family residential lot. The presence of parking for 14 cars, 11 of them on a surface parking lot, would immediately signal that a commercial use is situated on the Property. The Board therefore finds that the proposed parking facility would not be in harmony with the character of the surrounding residential properties. The Board finds that the traffic generated by the arrival and departure of 80 patients, the two doctors and nine staff members a day in connection with the proposed use would have a noticeable effect on the Property's immediate neighbors, but would not adversely affect the area's roadways. The Board finds, however, that the proposed use would not create an excessive concentration of similar uses in the area.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that, although the subject application does not meet the general requirements of Subsections 59-G.1.21(a)(2)-(4) above, the non-inherent adverse effects the proposed development would be expected to produce would not be sufficient to support a finding that the proposed use fails to conform with this Subsection 59-G.1.21(a)(5).

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board concurs with the Hearing Examiner's finding that there will be no objectionable noise, vibrations, fumes, odors, dust or physical activity at the site. Although the proposed use would generate considerable vehicular and foot traffic in and out of the building, the activities necessary to the operation of the use would all occur indoors. Exterior lighting is limited to two light poles in the parking lot, which would be turned off 30 minutes after the office closes each day, plus residential-type fixtures. The undisputed testimony of Petitioner's site planner supports the conclusion that these lighting fixtures would not create any objectionable illumination or glare.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master plan do not alter the nature of an area.*

The Board concurs with the Hearing Examiner's finding that Petitioner's special exception will not increase the number, intensity or scope of special exceptions in the area sufficiently to adversely affect the area.

- (8) *Will not adversely affect the health, safety, security, morals, or general welfare of residents, visitors, or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone*

The Board concurs with the Hearing Examiner that the proposed use would have no adverse effects on the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals, when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

The Board finds that the Property would continue to be served by adequate public services and facilities if the proposed use were to be approved.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will not reduce the safety of vehicular or pedestrian traffic.*

The Board finds that the requested special exception would not have a detrimental effect on the safety of vehicular or pedestrian traffic.

***Section 59-G-2.36. Medical practitioner's office for use of other than a resident of the building.***

- (a) *In all residential zones other than specified in Subsection (b) below, one or more offices of not more than 2 full-time medical practitioners may be permitted, provided:*

- (1) *The exterior of the premises is not changed or altered in appearance;*

The Board finds that this Subsection 59-G-.2.36(a)(1) does not prohibit the construction of Petitioner's proposed new building.

The Board notes the extensive discussion of this provision in the record and acknowledges the People's Counsel's argument that this provision presupposes that any non-resident medical practitioner must be housed in a pre-



existing building. However, the Board is persuaded by the Hearing Examiner's analysis:

The issue should be considered in light of several fundamental axioms of statutory interpretation. The cardinal rule is to ascertain and effectuate legislative intent. *Mayor of Baltimore v. Chase*, 360 Md. 121, 128 (2000). Where the statutory language is plain and unambiguous according to the commonly understood meaning of the words, the inquiry is at an end – the statute means what it says. See *id.* Where the language is unambiguous, a court (or board of appeals) may neither add nor delete language so as to reflect an intent not evidenced in the language, nor may it construe the statute “with forced or subtle interpretations” that limit or extend its application. *Id.* Wherever possible, a statute should be read “so that no word, clause, sentence or phrase is rendered superfluous or nugatory.” *Id.* Moreover, when a statute is part of a statutory scheme, legislative intent must be discerned by considering the statute in light of the statutory scheme of which it is a part. See *id.* at 129.

OZAH Report at 52.

The Board is persuaded by the discussion in Petitioner's post-hearing legal brief, Exhibit 54(a), which contrasts Subsection 59-G-2.36(a)(1) to other special exception provisions of the Zoning Ordinance that explicitly require certain special exceptions to be located in buildings that exist prior to the commencement of the proposed special exception use. (Exhibit 54(a).) The discussion of Section 59-G-2.38, which governs non-resident professional offices in residential zones, is particularly relevant, since that use compares readily to a non-resident medical practitioner in many respects, particularly its accommodation of the special exception use in residential structures in a residential zone, and the use's anticipated scope and impact. Section 59-G-2.38 requires that [a]n existing single-family structure may be used for professional office purposes by any member or members of a recognized profession . . .” Accordingly, if the legislature wishes to impose an express requirement, it clearly knows how to do so, and unlike Section 59-G-2.38, subsection 59-G-2.36(a)(1) implies, but does not require, that the structure to house the special exception exist previous to the establishment of the special exception.

Moving from the context of the Zoning Ordinance generally to the specific requirements for a non-resident medical practitioner, the Hearing Examiner discusses subsection 59-G-2.36(a)(1) within the confines of Section 59-G-2.36:

The most immediate context in which Sec. 59-G-2.36(a)(1) should be considered is the full list of specific conditions for the use – the rest of the section of which it is a part. Taken as a

whole, the section demonstrates an intent to permit medical offices in single-family residential neighborhoods only where they will have limited impacts: no changes to the exterior of the premises, which ensures continued compatibility of the structure with the neighborhood; at least 50 percent of the space used for residential purposes, which ensures some degree of compatibility; permitting medical offices in residential zones only where there is no other suitable space available nearby, indicating that the proposed use will meet a community need; and limiting the intensity of the use by restricting the number of medical practitioners and staff.

OZAH Report at 56.

The Board notes that there is no provision in the Zoning Ordinance which prohibits Petitioner from obtaining a building permit, constructing a house, and then seeking the desired special exception. Indeed, a reading of the plain language of subsection 59-G-2.36(a)(1) simply prohibits Petitioner from altering a building in order to accommodate the special exception once the building is built, whether or not the building exists when the applicant applies for the special exception. However, the Board notes that, as discussed in connection with subsection 59-G-1.21(a)(4) above, the scale and size of the development proposed here is disproportionately large when compared to the adjacent existing single-family development, and that the Petition therefore contradicts the clear intent of subsection 59-G-2.36(a)(1) that non-resident medical practitioners' offices in residential zones not be distinct from the surrounding homes.

*(2) Not less than 50 percent of the floor space of the building is devoted to residential uses;*

Petitioner proposes to devote approximately 57 percent of the floor space to residential use.

*(3) Office space suitable for the practice of the profession is unavailable in either the nearest commercial zone or the nearest medical clinic office building constructed according to a special exception grant;*

Dr. Dechter testified that no suitable, handicapped-accessible office space is available in a nearby shopping center, and that there is a small amount of space available in a professional office building in Aspen Hill some two or three miles away, but that the available space there was not readily accessible to handicapped persons. Mr. Nalls, the dental equipment manufacturer's representative, testified that he was aware of two or three dental practices in the Aspen Hill professional office building. (OZAH Report at 35-36.) On balance, the Board finds Dr. Dechter's testimony on this point credible, but notes that the

record lacks evidence as to the location of the nearest commercial zones and a record of any inquiries Dr. Dechter may have made regarding the availability of suitable space for the dental practice.

*(4) Additional medical specialists are not employed more than an aggregate of 40 hours per week and there are never more than 2 medical professionals, whether general practitioners or medical specialists, in such office on any one day. In consideration of an application for part-time medical specialist, the Board must consider the total number of employees and the total number of patients at any one time;*

The proposed dental practice would employ no more than 2 dentists.

*(5) The maximum number of nonprofessional support staff must be determined by the Board, taking into account the impact on neighboring residences of the resultant parking and traffic;*

The Hearing Examiner recommended limitations on the number of non-professional staff permitted on the site at any given time. Such limitations were intended to ameliorate the impact of the staff both while on the site and when commuting.

*(6) Such use will not constitute a nuisance because of noise, traffic or physical activity;*

The Board finds that, although the traffic impacts associated with the proposed use would be significant enough to have a non-inherent adverse impact on the neighboring properties, such traffic would not constitute a general nuisance. The Board finds that no non-inherent noise or physical activity is associated with the proposed use.

*(7) Such use will not tend to affect adversely the use and development of neighboring properties and the general neighborhood.*


The Board finds that, although the proposed use would not adversely affect the development of neighboring properties and the general neighborhood, as discussed in the context of Section 59-G-1.21 above, the Board finds that the proposed use would impose non-inherent adverse effects that would affect the use of neighboring properties, as discussed above.

*(b) In the R-H, R-10, R-20 and R-30 zones, one or more offices for one or more medical practitioners may be permitted, provided that . . . .:*

Not applicable.

On a motion by Caryn L. Hines, seconded by Donna L. Barron, with Allison Ishihara Fultz, Chair, in agreement, and Angelo M. Caputo and Wendell M. Holloway in opposition:

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that Case No. S-2629, Petition of Alan Dechter, is **denied**.



Allison Ishihara Fultz  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 10th day of February, 2006.

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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.